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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 765

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, et al.,
Petitioners,

vs.

TRANS WORLD AIRLINES, INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The City and County of San Francisco, petitioner herein, prays respectfully that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the District Court for the

Northern District of California, Southern Division, wherein the Circuit Court of Appeals held that a contract entered into with respondent, Trans World Airlines, Inc., in 1942 *froze* the established rates and charges for the common use facilities at the San Francisco International Airport for a period of twenty years, and that such rates and charges could not be subsequently changed as to respondent, Trans World Airlines, Inc., and that the City and County of San Francisco is not entitled to judgment for the sum of $95,942.64 from and after December 31, 1950 to February 28, 1954, in accordance with the lawfully established rates and charges fixed by the Public Utilities Commission of petitioner and paid for by all air carriers, with two exceptions, using the common use facilities at the municipal airport.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on December 19, 1955. (Exhibit "B".) A petition for rehearing was filed on January 16, 1956; an order denying rehearing was filed on January 31, 1956; an application for a stay of mandate was filed on February 2, 1956, and the mandate was by said Court of Appeals ordered stayed on February 3, 1956, until March 5, 1956, and on February 29, 1956, until March 19, 1956 or until disposition of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

OPINIONS BELOW.

The opinion of the Court of Appeals appears in the appendix of this petition as Exhibit "A"; and the opinion of the District Court for the Northern District of California, Southern Division (119 Fed. Supp. 516), appears in the appendix of this petition as Exhibit "C".

STATEMENT OF THE CASE.

In 1926 the voters of the City and County of San Francisco approved an initial appropriation of $100,000 for the construction of an airport. Since that date, $50,000,000 of its taxpayers' money has been invested in the San Francisco International Airport to make it one of the great air gateways of the world. Twelve scheduled air carriers (American Airlines, Canadian Pacific, Ltd., Flying Tiger Line, Inc., Japan Airlines, Pacific Southwest Airlines, Pan American World Airways, Qantas, Slick Airways, Inc., Southwest Airways Co., Trans World Airlines, Inc., United Airlines, and Western Airlines, Inc.) have been certificated to use this airport and its terminal facilities. Also, there are numerous non-scheduled carriers and private planes using the terminal facilities. All aircraft *use in common* the runways where planes land and take off; the landing aprons, or ramps, where passengers and cargo are taken on and discharged; the taxiways which connect the runways with the landing aprons or ramps; and other conveniences and facilities, such as lights, sig-

nals, beacons and control tower services. These are designated the common use facilities of the airport.

In 1941 petitioner, through its Public Utilities Commission, duly enacted a schedule of rates and charges for the common use facilities at the municipal airport, which were applicable to all air carriers using the facilities of its airport. The schedule of rates and charges was fixed in accordance with Section 130 of the Charter of the City and County of San Francisco.

Subsequent to the enactment of the schedule of rates and charges, the petitioner in 1942 entered into a contract with respondent, Trans World Airlines, Inc., for certain land area, hangar facilities and counter space for the sale of tickets in the terminal building. The term of said contract was for twenty years. Included in the contract was a schedule of rates and charges *for the common use facilities* which were identical, an exact transcription, in words and figures, with the rates and charges set forth in the duly enacted schedule of 1941 adopted by the Public Utilities Commission of petitioner under Section 130 of the Charter of the City and County of San Francisco.

Incorporated in the agreement was this provision, and it is fully set forth hereafter to emphasize its importance in the controversy at bar. Section 3 of the agreement states:

> *"Lessor further demises and lets unto Lessee the use, in common with others authorized so to do and on the same terms and conditions as apply to others, of any and all general facilities, im-*

provements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport, including, but without limitation, the landing field, runways, aprons, taxi-ways, sewerage and water facilities, marker and surface lights, floodlights, landing lights, signals, beacons, aids, control tower, and other conveniences for loading, flying, landings, and take-offs; and the causeways, docks, wharves and approaches thereto, parking areas, roads, streets, bridges, spur tracks, and other facilities and appurtenances of said Airport, for the Lessee, its employees, passengers, guests, vendors and contractors, patrons, and invitees, which use, without limiting the generality thereof, shall include (all of said facilities to be used and occupied in accordance with the rules and regulations of said Airport):"

In 1946 the City, after extensive costly improvements to the common use facilities fixed a new schedule of rates and charges after due notice by publication in a daily newspaper, public hearing, and proceedings before the Board of Supervisors in accordance with Charter Section 130. (Exhs. S-1, S-2, S-3, S-4, R. 624.)

Again, on November 12, 1950, and after further extensive improvements including a new terminal building then under construction, the petitioner's Public Utilities Commission adopted a schedule of rates and charges after due notice by publication and hearing for the use of the common use facilities at the Airport in accordance with Section 130 of the Charter. Said schedule was approved by the Board

of Supervisors of the City and County of San Francisco and became effective on January 1, 1951. (Exh. "E", R. 55; Exhs. T-1, T-2, T-3, T-4, R. 625.)

Respondent, Trans World Airlines, Inc., brought this action for declaratory relief and injunction in the United States District Court for the Northern District of California, Southern Division.

The District Court ruled in accord with petitioner's legal conclusions that the furnishing of common use facilities at the San Francisco International Airport constituted a public utility service; that the Public Utilities Commission of petitioner had rate-making jurisdiction over the airport; and that the law does not allow a public utility to depart from the regular schedule of rates and charges by contract whereby one consumer (TWA) would be given a preference over other competing consumers in the same class.

The Court of Appeals, in reversing the decision of the District Court, substantially adopted the respondent's contentions, and held that the operation of the San Francisco International Airport was not a municipal affair, rather it was a federal or state affair; that petitioner was governed by the State Municipal and County Airport Act of 1927 rather than its Charter of 1900 and its new Charter of 1932; that since the Municipal and County Airport Act of 1927 permitted contracts with air carriers for facilities at municipally owned airports, the City and County of San Francisco was bound by the terms of the contract of 1942, and the rates for the common use facilities were *frozen* for the duration of the contract (twenty

years); and that the City and County of San Francisco had by its action in entering into the contract of 1942 suspended its rate-making authority as to respondent, Trans World Airlines, Inc. Further, the Court of Appeals failed to rule on the question whether in the operation of its airport, petitioner is operating a public utility.

REASONS FOR ALLOWANCE OF THE WRIT AND QUESTIONS PRESENTED FOR REVIEW.

1. The Court of Appeals has decided an important state question in conflict with applicable state law, in that its decision is contrary to numerous state appellate and Supreme Court decisions, holding that the operation of municipally owned utilities is a "municipal affair" within the meaning of a state constitutional provision giving a municipal corporation operating under a freeholders' charter governmental authority over municipal affairs to the exclusion of the state legislature.

2. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, in that said Court has ruled that the operation of the said airport is not a municipal affair, but rather a state or federal affair, and by so deciding, has raised the question of whether the Civil Aeronautics Board has jurisdiction to regulate rates and charges for common use facilities at airports serving interstate air carriers.

3. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court, in that by this decision the Court of Appeals permits petitioner to discriminate among the several air carriers as to rates and charges for common use facilities at the said airport.

4. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, by failing to remand this case to the District Court to await exhaustion of the administrative remedy available to TWA before the Civil Aeronautics Board.

All of the foregoing questions are of nationwide importance and some are questions of first impression. Every municipality throughout the United States which operates an airport and every air carrier will be affected by the decision in this case, for the problem of rates and charges for common use facilities is common to all, although in each case the problem is colored by varying local statutes, constitutional and substantive provisions.

The petitioner, air carriers, cities, counties and states throughout the nation seek a final judicial determination regarding the nation's network of airports by an answer to the questions as herein presented.

I.

IN THE OWNERSHIP OF A MUNICIPAL AIRPORT, VIRTUALLY WHOLLY PAID FOR BY PETITIONER'S TAXPAYERS' MONEY, IS THE PETITIONER OPERATING A PUBLIC UTILITY, WHICH REQUIRES EQUAL, UNIFORM AND NON-DISCRIMINATORY CHARGES FOR ALL AIR CARRIERS ENGAGED IN FOREIGN INTERSTATE AND INTRASTATE AIR COMMERCE USING THE SAME COMMON USE FACILITIES, REGARDLESS OF PURPORTED FIXED CHARGES SET FORTH IN A CONTRACT BETWEEN PETITIONER AND RESPONDENT?

A. The Operation of a Municipally Owned Airport, Especially the Common Use Facilities, Is a Public Utility Business.

Of prime importance to the whole aviation industry, air carriers, airport operators and the Civil Aeronautics Administration is whether the operation of an airport is within the public utility field. The question has been presented in various state Courts and slightly referred to in federal determinations. If the operation of an airport is a public utility, no preference for rates or charges can be given to one air carrier over another in the same class.

In the instant case, the decision of the Court of Appeals would permit twelve contracts varying as to rates and charges between the petitioner and its customers using the common use facilities at the municipal airport; or, it would permit petitioner by contract to give a preference to respondent for the common use facilities as against air carriers in direct competition with respondent. The District Court (119 Fed. Supp. 516) determined that all air carriers using the common use facilities must be treated on a non-discriminatory basis since the operation of the San Francisco International Airport is a public utility business.

A review of the law in all jurisdictions where the question has been presented definitely holds that the operation of an airport by a municipality or other governmental agency is within the public utility field. See:

State v. Jackson (1929), 121 Ohio St. 186, 167 N.E. 396;

Jones v. Keck (1946), 74 Ohio App. 549, 74 N.E. 2d 644, 646;

State ex rel. City of Lincoln v. Johnson (1928), 117 Neb. 301, 220 N.W. 273, 274;

Price v. Storms, et al., Board of Trustees (1942), 191 Okla. 410, 130 Pac. 2d 523;

City of Toledo v. Jenkins (1944), 143 Ohio St. 141, 54 N.E. 2d 656;

State v. Board of County Commissioners (1947), 149 Ohio St. 583, 79 N.E. 2d 698;

Annotation, 161 A.L.R. 733.

In *Air Transport Association v. United States* [(1955), 9th C.C.A.], 221 Fed. 2d 467, the Court held that the United States in the operation of the Elmendorf Field in Alaska was engaged in a "public enterprise."

Respondent argues that the operation of the airport and especially the promulgation of rates and charges for the common use facilities is not a public utility function. If respondent's argument were true, petitioner could forbid any air carrier from landing at the San Francisco International Airport. It could, at the termination of the contract of 1942, charge respondent any amount it so desired for landing and takeoff charges, the use of taxiways, ramps and other

facilities. In other words, regardless of the provisions of the Civil Aeronautics Act of 1938, as amended, whereby respondent received a certificate of public convenience and necessity to serve Chicago, Illinois, and San Francisco on a nonstop flight schedule, petitioner, according to the argument of respondent, could forbid respondent from landing and taking off at the airport, or charge it six times more than it does American Airlines for the same privilege over the same route.

That the San Francisco International Airport is a public utility is fully recognized by the laws of the State of California and the Charter of the City and County of San Francisco.

Section 10001 of the Public Utilities Code of the State of California defines "public utilities" as it pertains to municipalities in these words:

> "'Public utility' defined. 'Public utility' as used in this article, means the supply of a municipal corporation alone or together with its inhabitants, or any portion thereof, with water, lights, heat, power, *transportation of persons or property,* means of communication, *or means of promoting the public convenience.*" (Emphasis added.)

Section 10004 provides:

> "Incidental powers included in power to acquire and operate public utility. For the purpose set forth in Sections 10002 and 10003 a municipal corporation may acquire, own, control, sell or exchange lands, easements, licenses, and rights of every nature within or without its corporate limits, *and may operate a public utility within or*

without the corporate limits when necessary to supply the municipality, or its inhabitants or any portion thereof, with the service desired." (Emphasis added.)

Section 120 of the Charter of the City and County of San Francisco creates a public utilities commission in the municipal government of the City and County of San Francisco.

Section 121 of the Charter provides in part that:

> "The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, *including airports,* for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof." (Emphasis added.)

Section 122 of the Charter enacts that utilities therein named, among which is the airport, "shall each be designated as a department under the commission."

Section 125 of the Charter provides, in part:

> "The public utilities commission shall have jurisdiction over the airport now being conducted by the City and County of San Francisco, . . ."

It must be concluded, therefore, that petitioner under federal, state, and City Charter provisions, in the operation of the San Francisco Municipal Airport, is engaged in a public utility business.

B. The Petitioner in the Operation of a Public Utility (Airport) Is Required to Charge Equal, Uniform and Non-discriminatory Charges for All Air Carriers Engaged in Interstate Air Commerce Using the Same Common Use Facilities at the Airport.

The fundamental principle of utility law, as adopted by the District Court, that all customers (air carriers) are to be charged equally and uniformly, without discrimination, for the use of the common use facilities at San Francisco International Airport, petitioner submits is the recognized law of the United States. This principle is set forth in the enactment of the Civil Aeronautics Act of 1938, as amended.

The aircraft of all air carriers, scheduled and non-scheduled, and all private aircraft are entitled, as a matter of law, to land and take off from the San Francisco International Airport.

The provisions of the Public Utilities Code of the State of California, and the case law of the Supreme Court of the United States and California all emphasize this principle.

Section 21637, Public Utilities Code of the State of California (Stats. of 1953, Chapter 151, §1) provides:

> "In no case shall the public be deprived of its rightful equal and uniform use of the airport, or navigation facilities, or portion of either."

49 U.S.C., Section 1110, provides:

> "The airport to which the provision relates will be available for public use on fair and reasonable terms *and without unjust discrimination.*" (Emphasis added.)

And in the enactment of the Civil Aeronautics Act of 1938, as amended, the Congress of the United States stated in the Declaration of Policy establishing the Civil Aeronautics Board, 49 U.S.C., Section 402:

> "In the exercise and performance of its powers and duties under this chapter, the board shall consider the following, among other things, as being in the public interest and in accordance with the public convenience and necessity.
>
> " . . .
>
> "(c) The promotion of adequate, economical and efficient service by air carriers at reasonable charges, *without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices.*" (Emphasis added.)

49 U.S.C., Section 484(b), provides:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever *or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.*" (Emphasis added.)

The Supreme Court of the United States has uniformly held that there can be no discrimination or discriminatory practices or preferences indulged in by carriers in interstate commerce, whether by rail, shipping or otherwise.

Baltimore & O. R. Co. v. United States (1939), 305 U.S. 507, held that where an interstate carrier's warehouse rates were not open to all shippers alike there was a violation of the Interstate Commerce Act.

In *United States v. Baltimore & O. R. Co.* (1948), 333 U.S. 169, this Court stated:

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first act, and all amendments to it, have aimed at wiping out discriminations of all types. New York v. United States, 331 U.S. 284, 296, 91 L. ed. 1492 on 1507, 67 S. Ct. 1207.
>
> "It would be strange if this legislation left a way open whereby carriers could engage in discrimination merely by entering into contracts for the use of trackage. In fact this court has long recognized that the purpose of Congress to prevent certain discriminations and prejudicial practices could not be frustrated by contracts even though the contracts were executed before enactment of the legislation."

Kansas City, Kansas, attempted to give preferential rates to tenants in its new terminal building. The Supreme Court of Kansas, in *Kansas and State ex rel. Parker v. Kansas City,* 151 Kan. 1, 97 Pac. 2d 104, held that the city had the authority to indulge in such preferential practices. However, this practice was enjoined as a violation of the Elkins Act in *Union Pacific Railroad Co. v. United States* (1941), 313 U.S. 450.

The action of the Maritime Commission in forbidding preferential treatment and establishing uniform demurrage charges on wharves in San Francisco and in the City of Oakland was upheld by the Court in *California v. United States* (1943), 320 U.S. 577.

The California Supreme Court has repeatedly held that public utility rates must be uniform, equal and nondiscriminatory.

Limoneira Co. v. Railroad Commission (1917), 174 Cal. 232;

Leavitt v. Lassen Irrig. Co. (1909), 157 Cal. 82;

Spring Valley Water Co. v. San Francisco, 61 Cal. 3;

San Diego Water Co. v. San Diego (1897), 118 Cal. 556;

City of Pasadena v. Railroad Commission (1920), 183 Cal. 526.

Also, Annotation in:

74 L. Ed. 234, et seq.

C. The Contract of 1942 Between Petitioner and Respondent, Although Valid When Made, Was Always Subject to Regulation.

There is no dispute as to the validity of the contract entered into in 1942 between petitioner and respondent. The rates for the *common use facilities* set forth in the contract were the valid rates for all air carriers using the same common use facilities at the San Francisco International Airport as duly enacted by petitioner in 1941.

The Court of Appeals and respondent would divest the Public Utilities Commission of petitioner from ever changing the rates for the public utility service, i.e., the common use facilities, during the life of the contract.

When the Public Utilities Commission duly enacted a new schedule of rates in 1946 and again in 1950 for the common use facilities at the airport, the contract of 1942 between petitioner and respondent was subjected to the new regulations governing charges.

In the instant case, the only governmental agency that had the power to regulate the public utility rates for the common use facilities was the Public Utilities Commission of petitioner under Section 130 of the Charter of the City and County of San Francisco.

Section 130 provides, in part:

> "The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.
>
> "Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service."

Respondent was charged with the knowledge that the common use facilities were always subject to regulation by the proper governmental agency.

It is a fundamental principle of utility law, where the law authorizes the regulation of service (common use facilities) rendered the public, that such law becomes a part of and controls contracts providing for the public service.

In re Cortaro Water Co. (1933), 3 Fed. Supp. 257;

17 C.J.S., §330, p. 784;

Pinney & Boyle v. Los Angeles (1914), 168 Cal. 12;

Law v. Railroad Commission (1921), 184 Cal. 737;

Leavitt v. Lassen Irrigation Co. (1909), 157 Cal. 82;

Limoneira Co. v. Railroad Commission (1917), 174 Cal. 232;

Mott v. Cline (1927), 200 Cal. 434;

Midland Realty Co. v. Kansas City Power & Light (1936), 300 U.S. 109;

Union Drygoods Co. v. Georgia Public Service Corp. (1919), 248 U.S. 372;

Railroad Commission v. Los Angeles Railway (1929), 280 U.S. 145, 152.

Also:

Annotation, 74 L. Ed. 234, reviewing both California and Federal cases on this subject.

II.

IN THE OWNERSHIP OF A MUNICIPAL AIRPORT, IS PETITIONER BY ITS CHARTER AND STATE LAW OPERATING THIS PUBLIC UTILITY AS A MUNICIPAL AFFAIR?

Where a municipality avails itself of the provisions of Article XI, Sections 6 and 8, of the California Constitution, and becomes a chartered city, or being a chartered city, or city and county, adopts a new charter (as San Francisco did by adopting a new charter in effect January 8, 1932), its powers over municipal affairs become all embracing, restricted and limited by the Charter only, and free from any interference by the State through general laws. In fact, the Charter supersedes all existing State laws on the same subject matter. *The city becomes independent of general laws upon municipal affairs.*

West Coast Advertising Co. v. San Francisco (1939), 14 Cal. 2d 516, 95 Pac. 2d 138;

Kennedy v. Ross (1946) 28 Cal. 2d 569, 170 Pac. 2d 904.

Under the provisions of Article XI, §19 of the State Constitution adopted in 1911 an airport is a "municipal affair." The first sentence of §19 of Article XI provides:

> "Any municipal corporation may *establish and operate* public works for supplying its inhabitants with light, water, power, heat, *transportation,* telephone service *or other means of communication.*" (Emphasis added.)

An airport is a public work for supplying inhabitants of the municipality with transportation within

the meaning of the constitutional provision. This is made clear in an interpretation by the State Supreme Court of the provisions of Section 20 of Article XII of the California Constitution also adopted in 1911 relative to the powers of the State Public Utilities Commission, in *People v. Western Airlines,* 42 C. 2d 621.

In that case, Western challenged the jurisdiction of the State Public Utilities Commission to establish intrastate rates for airline passengers on the ground that Article XII, §20 of the Constitution which conferred upon the Commission power over the rates of "transportation companies" did not include airline companies. The Court, at page 635 stated as follows:

> "The fact that airline transportation companies were not in existence when the Constitution was adopted in 1879 does not make them any the less 'transportation companies' within the meaning and contemplation of article XII. It was well said by the Supreme Court of Nebraska in *State ex rel. State Railway Com. v. Ramsey* (1949), 151 Neb. 333, at page 338 (37 N.W. 2d 502): '. . . A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable. *Pensacola Telegraph Co. v.*

Western Union Telegraph Co., 96 U.S. 1, 24 L.Ed. 708; 11 Am. Jur., Constitutional law §51, p. 660; 9 Am. Jur., Carriers, §4, p. 430. These principles have been held to be applicable to transportation by air. "Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result." *Curtiss-Wright Flying Service v. Glose*, 66 F. 2d 710, certiorari denied 290 U.S. 696 [154 S.Ct. 132, 78 L. Ed. 599] . . . [citations omitted].'"

Therefore, under Article XI, §19, San Francisco was given the direct constitutional grant to establish and *"operate"* an airport.

As heretofore pointed out, Sections 121, 122, 125, and 130 of the Charter of the City and County of San Francisco are the controlling laws as far as petitioner is concerned in its operation of the airport.

These sections make the airport a public utility under the jurisdiction of petitioner's Public Utilities Commission. Section 130 makes it mandatory for the Public Utilities Commission to establish rates and charges for the furnishing of services by any utility under its jurisdiction.

The City owns its own water system, which serves San Francisco, parts of Alameda County and most of the San Francisco Peninsula area. This water system links San Francisco with other areas and serves neighboring and outlying communities; its aqueducts and pipe lines stretch 150 miles from the

high Sierras through the Coast Range to San Francisco. That the State of California is greatly concerned with water is evidenced by a separate water code which legislates for over fifty water agencies. The use and control of water is more of a statewide affair than airports.

However, municipally owned water systems are municipal affairs under the jurisdiction of the municipality, *and not subject to State regulation.*

See:

South Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 93 Pac. 490;

City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 Pac. 25;

Jochimsen v. Los Angeles, 54 C.A. 715, 202 Pac. 902.

If municipally owned water, light, heat and power systems are "municipal affairs", it necessarily follows that a municipally owned airport is a "municipal affair."

On the other hand all *private* public utility water systems are under the jurisdiction of the Public Utilities Commission of the State. In fact *all* private public utilities are subject to the jurisdiction of the State Public Utilities Commission.

The State Supreme Court long ago ruled that municipally owned utilities were not under the jurisdiction of the State Public Utilities Commission. This was amply pointed out by the Court in *Durant v. City of Beverly Hills* (1940), 39 C.A. 2d 133, 137, 102 P. 2d 759.

And, in *Polk v. City of Los Angeles* (1945), 26 Cal. 2d 519, 539, 150 Pac. 2d 931, our Supreme Court states:

> "The present Railroad Commission (now Public Utilities Commission) was created by an amendment to the Constitution on October 10, 1911 (Cal. Const., Art. XII §22). Thereafter it was held that the powers conferred on the commission did not extend to the regulation of utilities operated by municipalities; that its power of regulation was limited to privately operated public utilities; and that the Legislature could not extend that power to embrace municipally operated utilities."

See also:

City of Pasadena v. Railroad Com. (1920), 183 Cal. 526, 192 P. 25;

Bowles v. City and County of San Francisco (1946), 64 Fed. Supp. 609;

Jochimsen v. City of Los Angeles (1921), 54 C.A. 715, 202 P. 902.

The City cited both *Krenwinkle v. City of Los Angeles* (1935), 4 Cal. 2d 611, and *Ebrite v. Crawford* (1932), 215 Cal. 724, to show that the California Supreme Court regarded the operation of an airport as a "municipal affair". The Court of Appeals misconstrued the purpose of the citations and stated:

> "These cases support the view that the conduct of a municipal airport is a matter subject to State Law."

San Francisco acquired its airport in 1926 prior to the amendment of the Municipal and County Air-

port Law (Cal. Stats. 1927, p. 458). The airport was not acquired under the State Airport Act as in the *Krenwinkle* and *Ebrite* cases, supra. The City's airport came into being under the provisions of California Statutes of 1911, Chapter 715, and Article XII of the Charter of 1900, as amended. It was acquired as a public utility, just as the City acquired the Spring Valley Water System, Market Street Railway Company, and the California Street Cable Railroad Company.

The fact that the Municipal and County Airport Law refers to "any such city and county" (San Francisco being the only combined City and County in the State) is of no significance, since the airport was already established by petitioner prior to enactment of the Municipal and County Airport Law. The real question is whether the statute regulates a matter of statewide concern or attempts to regulate a municipal affair contrary to the provisions of Article XI, §6 of the California Constitution. On two occasions, where municipal affairs were involved, California Courts have ruled that the San Francisco charter and ordinance provisions prevail over general statutes, in spite of the fact that the statutes involved were addressed to "every city, or city and county" (*Burke v. Board of Trustees, etc.*, 4 Cal. App. 235), and to each contractor awarded a construction contract "by any county, city and county, city, town or district therein". (*Loop Lumber Co. v. Van Loben Sels, et al.*, 173 Cal. 228).

We have diligently searched the law in the State of California and have been unable to find a *single case* holding that where a municipality owns and operates its own public utility, it is not a municipal affair under the jurisdiction of the owner-municipality.

Of main importance to the issue at bar and completely overlooked by the Court of Appeals was the ratification of the new Charter of the City and County of San Francisco in 1932 by the State Legislature.

The District Court pointed out that "the approved charter of a municipality is a law of the state and has the same force and effect as a law enacted by the Legislature." (Citing *Yosemite Etc. v. State Board of Equalization* (1943), 59 Cal. App. 2d 39.)

The City agrees that when the contract was entered into in 1942 with TWA it was a valid contract. That contract, however, embodied every provision of rates and charges for common use facilities at the airport under the legal schedule adopted in 1941 by the City, under its Charter powers. The City at the time of the contract was controlled by its Charter of 1932 and not the general Municipal and County Airport Law of 1927, which applied to cities and counties that had not legislated on the same subject matter.

Home Telephone Co. v. Los Angeles, 211 U.S. 265, emphasizes that a City must have express power through its charter to contract as to rates. No such power is given to the petitioner through its Charter.

The interpretation of what can and cannot be done by authorities operating airports, especially "common use facilities" is ably expressed by the Court in *Hillsborough County Aviation Authority v. National Airlines* (1953), 63 So. 2d 61, 40 A.L.R. 2d 1056.

The contract of 1942 was valid when entered into because the rates and charges set forth in the contract were the valid rates for the "common use facilities". Those rates applied to all air carriers—not to TWA alone. If the rates set forth in the contract *were special rates* and not subject to further regulation by the City, as a matter of law, the contract was *ultra vires,* for the City is not empowered to divest itself of its police power.

Commencing with the leading case of *Hesse v. Rath,* 249 N.Y. 435, 164 N.E. 342, it has universally been held by the Courts that a City which owns and operates an airport performs this function as a matter of local concern and is governed by the law applicable to matters which concern the municipality exclusively as a "local concern" or "municipal affair."

Mr. Justice Cardozo stated in the *Hesse v. Rath* case:

> "A city acts for city purposes when it builds a dock or a bridge or a street or a subway. (*Sun Printing & Pub. Ass'n v. New York,* 152 N.Y. 257, 46 N.E. 499, 37 L.R.A. 788) *Its purpose is not different when it builds an airport.* (*Wichita v. Clapp,* 125 Kan. 100, 263 Pac. 12, 63 A.L.R. 478) Aviation is today an established method of

transportation. The future—even the near future—will make it more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition." (Emphasis added.)

Numerous other jurisdictions hold that the maintenance and operation of municipal airports are for a municipal purpose and are municipal affairs. See:

City of Wichita v. Clapp, 125 Kan. 100, 263 Pac. 12;

Dysart v. St. Louis, 321 Mo. 514, 11 S.W. 2d 1045;

City of Ardmore v. Excise Board, 155 Okla. 126, 8 Pac. 2d 2;

State v. Clausen, 157 Wash. 457, 289 Pac. 61;

City and County of Denver v. Board of Commissioners, 113 Colo. 150, 156 Pac. 2d 101.

III.

IF THE OWNERSHIP OF THE AIRPORT IS NOT A MUNICIPAL AFFAIR UNDER THE CONTROL OF PETITIONER, IS IT A FEDERAL AFFAIR UNDER THE CIVIL AERONAUTICS ACT OF 1938, AS AMENDED, DIVESTING THE FEDERAL COURTS OF JURISDICTION UNTIL ADMINISTRATIVE REMEDIES HAVE BEEN EXHAUSTED?

Assuming without admitting, that the Court of Appeals is correct, that petitioner can enter into a contract giving a preference of rates and charges for the common use facilities at the airport, the City submits that such a contract must first be approved by the

Civil Aeronautics Board, since it would be a "federal affair."

The evidence is uncontradicted that the contract in question gives to TWA lower rates for the common use facilities than those charged to ten other air carriers using the same common use facilities.

In *S. S. W., Inc. v. Air Transport Ass'n of America* [CADCC (1955)], 191 Fed. 2d 658, the basis of the complaint was that American Airlines, TWA, Braniff Airlines, Colonial Airlines, Eastern Airlines, Capital Airlines, Northwest Airlines, Pan American Airlines and United Airlines had entered into an agreement which violated the anti-trust laws. The Court ruled that recourse must first be sought through the Civil Aeronautics Board, and remanded the case to the District Court until the Civil Aeronautics Board had determined if the contract in question was violative of the provisions of the Civil Aeronautics Act of 1938, as amended.

The Court stated (p. 661):

> "The aircraft industry, like railroads and power, is one in which Congress has decided that the public interest is best served, not by free competition, but rather by direct and uniform regulation by an 'agency authorized to supervise almost every phase of the regulated company's business.'"

The Court further states (p. 662):

> "It provides that 'Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, *of every contract or*

agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier *for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulatory stops, schedules, and character of service, or for other cooperative working arrangements.*" (Emphasis added.)

In the case at bar there is no showing that TWA had its contract approved by the Civil Aeronautics Board by which it claims it is entitled to a preference in rates for the common use facilities as against the other air carriers using the same facilities under rates and charges legally promulgated by the Public Utilities Commission of the City.

The Civil Aeronautics Act provides for detailed and comprehensive economic regulation by the Board. It has control of certificates of public convenience and necessity (49 U.S.C., Section 481); supervision of rates and services (49 U.S.C., Section 484); authority over mail rates (49 U.S.C., Section 486); loans and financial aid from United States agencies (49 U.S.C., Section 490) and pooling or other agreement (49 U.S.C. 492).

Further, the Board is empowered to initiate or hear complaints of "unfair or deceptive practices or unfair methods of competition in air transportation," and to issue cease and desist orders against such practices or methods of competition. (49 U.S.C., Section 491.)

Under the Airport Development Act, 49 U.S.C., Section 1110 provides:

> "As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that—(1) the airport to which the project relates will be available for public use on fair and reasonable terms and *without unjust discrimination.*" (Emphasis added.)

In *S. S. W., Inc. v. Air Transport Ass'n of America,* supra, the Circuit Court remanded the case to the District Court, as being consistent with *General American Tank Car Corp. v. El Dorado Terminal Co.* (1940), 308 U.S. 422, 433; 60 S.Ct. 325, 331; 84 L. Ed. 361, in which this Court said:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal but . . . the cause should be held pending the conclusion of an appropriate administrative proceeding."

If the operation of the airport is a federal affair, then, under the Civil Aeronautics Act, the Civil Aero-

nautics Board is a regulatory body with powers analogous to those of the Interstate Commerce Commission and the Maritime Commission.

The contract giving respondent, TWA, preferences over other air carriers using the common use facilities at the San Francisco International Airport should be approved by the Civil Aeronautics Board before the federal Courts take jurisdiction of the matter, and the case at bar should be remanded to the District Court until such time as a ruling is made by the Civil Aeronautics Board, upon the right of the City to enter into a contract giving preferential rates to TWA and regulating the rates for the same facilities for ten other scheduled air carriers. (*S. S. W., Inc. v. Air Transport Ass'n of America, et al.*, 191 Fed. 2d 658.)

We submit that if the matter before this Court is a "federal affair" the primary jurisdiction rests in the Civil Aeronautics Board. Petitioner still emphasizes that the only logical and legal jurisdiction in the instant case rests in petitioner's Public Utilities Commission.

IV.

IF THE OPERATION OF THE AIRPORT IS NEITHER A MUNICIPAL NOR FEDERAL AFFAIR, IT MUST BE A STATE AFFAIR CONTROLLED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND THIS COURT IS WITHOUT JURISDICTION.

Regulatory power must rest in some governmental body if discrimination in the use of facilities common

to all air carriers is to be avoided. The City insists that under Section 130 of the Charter it is empowered to regulate the rates and charges for the common use facilities at the airport.

The Court of Appeals in reviewing the *Krenwinkle* and *Ebrite* cases, supra, states:

> "These cases support the fact that the conduct of municipal airports is a matter subject to state law."

Assuming, without admitting, that the operation of an airport by a municipality is a "state affair", the contract in question as to the common use facilities would be *ultra vires,* since it gives preference to respondent, TWA.

Section 453 of the Public Utilities Code of the State of California provides:

> "§453. *Preferential rates prohibited.* No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

Section 728 provides:

> "§728. *When fixing of rates by commission required.* Whenever the commission, after a hear-

ing, finds that the rates or classifications, are * * * discriminatory, or preferential, the commission shall determine and fix by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force."

If the State owned or *controlled* the airport, the contract in the instant case would be void. Section 21637 of the California Public Utilities Code provides, in part:

> "§21637. *Contracts, etc., for operation of airports, etc.* * * * In each case the commission may establish the terms and conditions and fix the charges, rentals, or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with regard to the property and improvement used and the expenses of operation to the State. In no case shall the public be deprived of its rightful, equal, and uniform use of the airport, air navigation facility, or portion of either. The commission shall grant no exclusive privilege for the sale or delivery of gasoline or other petroleum products."

If the regulation of rates and charges of common use facilities that respondent TWA complains is in violation of the contract of 1942 and the question is a "state affair", according to the decision of the Court of Appeals, then Section 1702 of the California Public Utilities Code provides respondent TWA its remedy.

However, petitioner still emphasizes that the only logical and legal jurisdiction rests in petitioner's Public Utilities Commission.

CONCLUSION.

The question involved in this controversy is a conflict between federal, state and municipal jurisdiction over the regulatory power to set rates and charges for public utility services, i.e., common use facilities at a municipally owned airport.

The answer to the problem is novel, difficult and important not only to petitioner and respondent, but to all municipalities throughout the Nation, the air carriers, States and the Civil Aeronautics Board.

Jurisdiction must rest *somewhere,* either in the city that owns and operates the airport under its charter; in the State, under the general laws vesting jurisdiction in its public utilities commission; or in the Federal Government, under the Civil Aeronautics Act of 1938, as amended.

Jurisdictional conflict exists between the federal, state and local authorities.

The federal Court in *S. S. W., Inc. v. Air Transport Ass'n of America* (1951), 191 Fed. 2d 658, stated, in the matter of violation of the anti-trust laws, that jurisdiction rests with the Civil Aeronautics Board.

The Court of Appeals in the case at bar leaves the question so vague that it cannot be determined

whether the federal, state or local authority has jurisdiction.

In *People v. Western Airlines,* 42 Cal. 2d 622, the Supreme Court of California ruled that as to intrastate fares, the Public Utilities Commission of the State was the proper regulatory body.

In the case at bar, the District Court, 119 Fed. Supp. 516, stated that the operation of the airport was a public utility and the regulation of the common use facilities was a public utility function under the regulatory power of the petitioner through the provisions of the Charter of 1932, especially Section 130 thereof.

Petitioner respectfully submits that for the foregoing reasons and questions involved herein this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
March 2, 1956.

Respectfully submitted,

DION R. HOLM,
City Attorney of the City and County of San Francisco,
THOMAS M. O'CONNOR,
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(Appendix Follows.)

Appendix

EXHIBIT "A"

United States Court of Appeals
for the Ninth Circuit

Trans World Airlines, Inc., a corporation, Appellant, vs. City and County of San Francisco, a municipal corporation, Phillip S. Landis, Sam McKee, Victor S. Swanson, Edward B. Baron and Donald A. Cameron, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. Dixon, as Manager and Chief Engineer of the San Francisco Airport, and J. M. Turner, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco, Appellees.	No. 14,523 Dec. 19, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: Stephens, Orr and Pope, Circuit Judges.

Orr, Circuit Judge:

We have for determination the interesting question of whether or not the City and County of San Fran-

cisco, having contracted through its duly authorized officials to permit Trans World Airlines, Inc., to use "common use facilities" at the San Francisco International Airport, situate in San Mateo County, at fixed rates for a term of years, may thereafter, through its duly constituted Public Service Commission, change the contract rates.

In 1942 the City and County of San Francisco, hereafter City, entered into a formal agreement, executed and to be performed in the state of California, with Trans World Airlines, Inc., hereafter T.W.A., one of twelve scheduled airlines currently using the airport. The lease was for a twenty-year term, at charges fixed by the agreement. The property leased consisted of a hangar and certain space in the administration building and, in addition, certain "common use" facilities. Common use facilities are those areas and facilities used in common by the several airlines. Included in this category are landing fields, runways, aprons, taxi-ways, sewerage, water facilities, various lights and signals, control tower service and other conveniences supplied by the airport.

On November 20, 1950, after notice and hearing, the Public Utilities Commission of the City and County of San Francisco promulgated Resolution No. 11,182, thereafter duly approved by the Board of Supervisors of the City and County of San Francisco,[1] purporting to establish prescribed rates and charges for the use of the facilities of the airport. The resolution fixed the charges for the common use

[1]Resolution No. 10,628, December 18, 1950.

facilities at a figure higher than that set in the 1942 contract.

In January 1951 the City notified T.W.A. that T.W.A. would be expected to make payment for future use of the common use facilities at the rates fixed by the Commission's schedule. It gave notice that should T.W.A. fail to make such payments the City would deny to T.W.A. the right to refuel its planes at the airport. Thereupon T.W.A. sought an injunction against this threatened action and prayed for a declaratory judgment to the effect that its contract rates are binding on the City. The City defended on the ground that the 1942 contract was superseded by the Commission's resolution. The City withdrew its threat to deny refueling privileges and no hearing was held on the injunction issue. The District Court sustained the City's theory and entered judgment accordingly.

T.W.A. maintains that the City was granted express statutory authority to enter into the subject contract by section 4 of the Municipal and County Airport Law (Cal. Stats. 1927, p. 458) which was in force in 1942.[2] Section 4 provided, in part, as follows:

"In connection with the erection or maintenance of any such airport or airports, or air navigation facilities, any such city and county . . . or any municipal corporation, shall have the power and jurisdiction . . . to lease or assign for operation such space or area, appurtenances, appliances or other conveniences nec-

[2]The provision was repealed in 1949 but similar provisions were included in Government Code sections 50470-50478.

essary or useful in connection therewith . . . to enter into contracts or otherwise cooperate with the federal government or other public or private agencies, and otherwise exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air."

This statute grants plenary authority to lease and contract. The use of the term "any such city and county" is a direct reference to San Francisco, which is the only combined city and county in the state.

It is not contended that in the execution of the contract the parties failed to observe any formalities necessary to the exercise of the powers conferred by the statute. The City takes the position, however, that the statute purports to regulate a "municipal affair" and thereby violates certain prohibitions of the state constitution.

Article XI, section 6 of the California constitution provides, in part, as follows:

". . . Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. . . ."

Article XI, section 8(j) provides in part:

"Municipal Affairs.

"It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

T.W.A. recognizes that the effect of Article XI is to preclude regulation by the state legislature of "municipal affairs"[3] but it contends that the operation involved in this suit is not included within the meaning of that term as used in Article XI.

The phrase "municipal affair" is a term of art. Its meaning as used in the constitution must be sought in the decisions of the California courts. The latter courts have repeatedly declared that a matter is not a "municipal affair" unless it is of strictly local interest. Any doubt is to be resolved in favor of state regulatory power. Thus, in Los Angeles Ry. Corp. v. Los Angeles, 16 Cal.2d 779, 783, 108 P.2d 430, the Court said:

". . . But the question here is disposed of by our conclusion that the facts disclose that the one-man or two-man operation of cars over the plaintiff's railway system is not a matter exclusively of municipal con-

[3]T.W.A. argues in the alternative that authority to enter into the subject contract is contained in the San Francisco Charter. We inquire first as to the applicability of the statutory authorization for the reason that the existence of such authorization is material to other questions presented by this case.

cern and is, therefore, not a municipal affair within the meaning of said sections of the Constitution; and that the question of such operation does not relate merely to the power to make and enforce local, police sanitary or other regulations covering the plaintiff which it may be assumed has vested in the City of Los Angeles, pursuant to the provisions of said section 23; or, if it may be said to be a police regulation, that it relates to a matter which is not strictly a local affair and, therefore, has not been included in the reserved power."

To the same effect, see City of Los Angeles v. Post War, etc., Bd., 26 Cal.2d 101, 156 P.2d 746; Bay Cities Transit Co. v. Los Angeles, 16 Cal.2d 772, 108 P.2d 435; Civic Center Assn. v. Railroad Comm., 175 Cal. 441, 166 Pac. 351; and Pac. Tel. & Tel. Co. v. City of Los Angeles, 44 Cal.2d 272, 282 P.2d 36. See also, McQuillin, Municipal Corporations, 3rd Ed., §4.85. The facts of the instant case place it much farther outside the orbit of a "municipal affair" than do those of any of the cases, supra.

The airport is not a strictly local affair. It is part of a global system of air transportation. Its value stems from the fact that it links the San Francisco area with other areas served by airports. It directly serves not only the City of San Francisco but all neighboring and outlying communities. The airport is used by military aircraft. Federal and state authorities regulate charges for common carrier air traffic.[4]

[4]See 49 U.S.C.A. §642; also, People v. Western Airlines, Inc., 42 Cal. 2d 621, 268 P.2d 723.

The City relies on the cases of Krenwinkle v. City of Los Angeles, 4 Cal.2d 611, 51 P.2d 1098, and Ebrite v. Crawford, 215 Cal. 724, 12 P.2d 937, in support of its contention that the airport is a "municipal affair." These cases, however, hold only that the maintenance and operation of a municipal airport is an activity in which a city may properly engage. In each case the Court cited the municipal and county airport law, supra, to show that the state had expressly authorized this activity. If the Supreme Court of California had viewed the operation of municipal airports as a "municipal activity" in the technical sense of those words, a matter thereby excluded from state regulation, it could not have regarded the municipal and county airport law as a source of authority to conduct such airports. These cases support the view that the conduct of municipal airports is a matter subject to state law.

The authorities from other jurisdictions cited by the City are distinguishable.[5] They deal with the question of whether or not a city has sufficient interest in the construction and operation of an airport to justify the expenditure of municipal funds, the use of the tax power, the use of public properties or the use of condemnation proceedings. As the Supreme Court of California observed in the recent case of Pacific Telephone and Telegraph Co. v. City of Los

[5]City of Wichita v. Clapp, 125 Kan. 100, 263 Pac. 12;
Dysart v. St. Louis, 32 Mo. 514, 11 S.W.2d 1045;
City of Ardmore v. Excise Board, 155 Okla. 126, 8 P.2d 2;
State v. Clausen, 157 Wash. 457, 289 Pac. 61;
City and County of Denver v. Board of Commissioners, etc., 113 Colo. 150, 156 P.2d 101.

Angeles, supra, p. 281, the fact that the city could lawfully regulate a business does not make the matter a "municipal affair" in the sense that the general state law is supplanted. We are persuaded that express statutory authorization existed for the execution of the 1942 agreement.

The City has bound itself as to rates and charges for the common use facilities by entering into a valid contract expressly authorized by state law. Even so, argues the City, the rate schedule of the contract was superseded by subsequent regulation by the Public Utilities Commission. In discussing this contention we assume arguendo that the Public Utilities Commission's regulatory jurisdiction extends to the airport.[6]

The City had authority under this assumption to proceed by contract or by regulation. It elected to proceed by contract. The rule of law governing a subsequent attempt by the municipality to vitiate a contract such as that before us through subsequent exercise of its regulatory power is well stated in 43 Am. Jur., §88:

"It has been held in numerous cases, however, that a state legislature unless prohibited by constitutional

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[6]T.W.A. urges that the airport is not a public utility and therefore not subject to regulation by the Commission, that even if it be subject to regulation the Commission has not lawfully exercised its regulatory power in that there has been no finding after hearing that the contract rate was excessive and finally that the terms of the Commission's resolution exempted the subject contract. The resolution provided that the rates prescribed were adopted "except as otherwise provided, or amended by agreement."

provision may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public utility for a reasonable term of years, the effect of which is to suspend, during the life of the contract, the governmental power of the state or municipality to fix or regulate the rates." See also, Annot. 74 L.Ed. 234, 236, to the same effect.

Authorities sustaining this rule are Public Service Co. v. St. Cloud, 265 U.S. 352, Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496, and Femmer v. City of Juneau, 9 Cir. 1938, 97 F.2d 649.[7] In the Vicksburg case the Supreme Court held, p. 508:

"That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. Los Angeles v. Los Angeles City Water Co., 177 U.S. 558, Walla Walla v. Walla Walla Water Co., 172 U.S. 1-7, New Orleans Waterworks Co. v. Rivers, 167 U.S. 674, Freeport Water Co. v. Freeport, 180 U.S. 587-593."

In the instant case the statutory authority conferring the power to contract was more express than that found sufficient in the cases above noted.

The City cites a line of cases holding that contracts entered into by a public utility and a private party are subject to superseding subsequent rate making

[7]Cf. Home Telephone Co. v. Los Angeles, 211 U.S. 265.